



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.94 OF 2018

SAMUEL GITHINJI KARIUKI.....CLAIMANT

VERSUS

COMPLY INDUSTRIES LIMITED.....RESPONDENT

JUDGEMENT

The facts of the claim herein are that the claimant was employed by the respondent as a supervisor in the security department, Njoro branch on casual terms from 25th January, 2010 to 28th October, 2016. He was paid a wage of Ksh.4, 080.00 per week.

On 28th January, 2016 the claimant reported to work in the evening for the night shift but he was not allocated duty and was directed to report at the head office in Nakuru for more information.

The claim is that there was no reason given for termination of employment. The notice given was too short. There was no due process.

The respondent through its officers opted to pay the claimant in lieu of notice, severance pay and leave pay. The claimant disputed the tabulation of his terminal dues where he was given a mere Ksh.134, 644.00.

The respondent had been paying to the NSSF.

The claim is also that there was unfair termination of employment after working for 7years. There was no house allowance paid and claims the following dues;

- a) Notice pay Ksh.16,392.00;
- b) House allowance ksh.73,764.00;
- c) Leave earned Ksh.32,784.00;
- d) Compensation;
- e) Severance pay Ksh.16,392.00;
- f) Certificate of service; and
- g) Costs

The claimant testified that he worked for the respondent for 7 years. His employment was terminated by retirement. That in September, 2016 he was issued with notice of redundancy and in November, 2016 he was called for his redundancy dues.

The claimant also testified that on 28th September, 2016 he was issued with notice that his work would cease on 28th October, 2016. He was invited to collect a cheque with payment for his terminal dues. He collected the cheque but did not agree with the tabulation of the dues as this was too low and claim as pleaded. He was not a casual employee as stated by the respondent and was on a daily wage of ksh.820.00 without the payment of a house allowance. There was wrongful termination of employment and compensation is due.

The defence is that the claimant was employed as a supervisor in the security department from 11th January, 2010 to 28th October, 2016 at a daily rate of ksh.820.00 which was paid at each end of week.

By a letter dated 28th September, 2016 the claimant was notified of a redundancy following the installation of CCTV camera which resulted in reduction of manpower. He received the notice and signed for it. He was also given a detailed explanation as to why employment was due for termination in a month on 28th October, 2016.

The claimant was paid his terminal dues but he disputed the tabulation but he was paid for notice and adequately compensated. There was no unfair termination of employment, there was notice with reasons for redundancy and the claims made are without justification and should be dismissed with costs.

Nicodemus Musyoka testified that he is the human resource manager for the respondent and that the claimant was a casual employee of the respondent paid a daily wage at ksh.820.00 which was allowed to accumulate and paid weekly. He issued a redundancy notice following installation of CCTV cameras and the guards reduced. The claimant got his written notice issued a month prior and which he accepted and signed in acknowledgement.

The claimant worked until 28th October, 2016 and was paid for all days worked, notice pay and leave days owing. The labour officer had been informed and confirmed the dues owing.

The claimant was paid severance pay for 5 full years worked. The certificate of service is ready for collection. The respondent complied with the provisions of section 41 of the Employment Act.

Total dues paid were Ksh.134, 644.00 comprised of;

Severance pay;

Notice pay; and

Leave days in cash.

At the close of the hearing each party filed written submissions.

At paragraph 4 and 6 of the Memorandum of Claim, the claimant pleaded that he reported to work for the night shift at his work station at Njoro when he was directed to report to the head office at Nakuru but the notice was too short. He then pleaded that he was paid his due in notice pay, severance pay and leave days owing.

In his evidence on 7th October, 2019 the claimant testified that he was retired from his employment. That he was issued with notice of redundancy on 28th September, 2016 taking effect on 28th October, 2016.

The evidence under oath tally with the defence case that the claimant was on 28th September, 2016 issued with a redundancy notice and that the human resource officer explained the same to him and which he signed and has since been paid terminal dues of ksh.134,644.00 being for notice pay, 5 years severance pay and leave days due.

Section 40 of the Employment Act, 2007 allow an employee to terminate employment lawfully where there is a redundancy and issue the employee with notice and give the operational reason(s) leading to the redundancy. It is not in dispute that the respondent installed CCTV cameras and thus required to reduce the security guards. The claimant was issued with a written notice that his employment as a night security guard would terminate. Such was lawful and procedural under the applicable law on redundancy, section 40 (1) of the Employment Act, 2007.

On the terminal dues paid, the claimant has contested that the payment of Ksh.134, 644.00 was too low and should be reviewed.

On the claim for notice pay, the claimant was earning a daily wage of Ksh.820.00 all paid weekly. In total in a given month the claimant was earning Ksh.24, 600.00. He was placed at Njoro.

Under the applicable Wage orders as of October, 2016 the claimant was entitled to a daily wage of ksh.336.30 all being Ksh.10, 089.00 per month or a monthly wage of ksh.6, 970.00. On the daily wage payable, the Wage Orders provided that the same was inclusive of the due house allowance.

In this case the claimant was paid based on daily wage tabulation of ksh.820.00 and which is way above the minimum wage due even with the best application of the monthly wage due for the Njoro area where he was based. Even where the due monthly wage was to be paid together with the house allowance, the claimant still received more and way above the minimum.

To claim a house allowance outside of what was paid is an unjust enrichment.

The claimant has acknowledged receipt of his notice on 28th September, 2016 and was also paid in lieu of notice. The court finds the respondent well applied the provisions of section 40 of the Employment Act, 2007 in this regard.

Both parties confirmed employment subsisted from 11th January, 2010 to 28th October, 2016 a period of 6 full years and 3 months. For the 6 full years worked, the severance pay is 15 days' pay for each year worked all at $820 \times 15 \times 6 = 73,800.00$ in severance pay.

The claimant was paid Kshs. 61,500.00 on the basis that he had worked for 5 full years which is in error and is owed Ksh.12,300.00 in severance pay.

Accrued leave is claimed at ksh.32, 784.00 whereas the claimant was paid ksh.Ksh.97, 580.00 which is way above what is claimed.

From the total dues payable to the claimant in redundancy, section 49(2) of the Employment Act, 2007 applied, such was due for taxable pay deduction. Such deduction(s) is/are mandatory.

Accordingly, the claims made are hereby found without merit and are hereby dismissed save the claimant shall be paid Ksh.12, 300.00 paid less in severance pay. Each party shall meet own costs.

Delivered at Nakuru this 28th day of November, 2019.

M. MBARU

JUDGE

In the presence of:

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